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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ROXANN THOMPSON, Plaintiff, Cross-defendant and Respondent, v. THOMAS FUHRMAN, Defendant, Cross-complainant and Appellant.	D075129 (Super. Ct. No. MCC1401536)

APPEAL from a judgment of the Superior Court of Riverside County, Raquel A. Marquez, Judge. Reversed; remanded with directions.

Hamilton & Associates, Kristine Stcynske, Michaele M. Gonzalez and Ben-Thomas Hamilton for Defendant, Cross-complainant and Appellant.

Roxann Thompson, in pro. per., for Plaintiff, Cross-defendant and Respondent.

Following a bench trial, both Roxann Thompson and Thomas Fuhrman were denied relief on the complaint and cross-complaint they brought against each other. In

the statement of decision, the court determined that each party would bear his or her own costs. Through a motion entitled "Response to Court's Statement of Decision," Fuhrman sought costs as the prevailing party under Code of Civil Procedure section 1032,[1] subdivision (b). The court framed Fuhrman's filing as a motion for reconsideration and noted that such a motion was untimely. Thus, the court did not modify the statement of decision to award Fuhrman costs under section 1032. The court subsequently entered judgment, wherein each side was to bear his or her own costs.

Fuhrman appeals, contending he is entitled to costs under both section 1032 and Labor Code section 218.5. We agree that he was the prevailing party under section 1032, subdivision (a)(4), and thus, is entitled to costs under that statute. However, he is not entitled to costs under Labor Code section 218.5, and that section, based on the determination of the trial court after remand, might limit the recovery of some of his claimed costs. Accordingly, we reverse the judgment as to the issue of costs only and remand this matter for further proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

The underlying facts of the dispute between the parties is not germane to our analysis of the issues before us. As such, we only briefly discuss the facts to provide some context.

Fuhrman owned and operated Wooden Nickel Ranch (WNR), a 23-acre ranch located in the city of Menifee. Over the years, Fuhrman hosted events at WNR, including pro bono events and private parties. Thompson first came to WNR in 2009 as a party

1 Statutory references are to the Code of Civil Procedure unless otherwise specified.

decorator looking for a venue to rent for a party. Fuhrman and Thompson eventually became close friends. In November 2009, Thompson and her son rented the guesthouse on WNR.

From November 2009 through November 2014, Fuhrman and Thompson entered into at least two separate oral agreements. One was a rental agreement for the guesthouse, which was modified into a rent for work agreement. The second was a joint venture agreement. Eventually, Fuhrman's and Thompson's relationship soured in 2014, culminating in Fuhrman evicting Thompson from the guesthouse.

Thompson then sued Fuhrman for several causes of action, all arising out of their alleged agreements. In the operative complaint, Thompson alleged eight causes of action: (1) violation of wage and hour requirements (unpaid minimum wages and unpaid wages promised), (2) unpaid overtime, (3) violation of the unfair business practices act (Bus. and Prof. Code, § 17200), (4) paystub violations (Lab. Code, § 226), (5) wrongful discharge in violation of public policy based on a claim of unlawful wage and Labor Code violations, (6) wrongful termination in violation of public policy based on unlawful coercion or influence in political activities and political affiliations, (7) injury to employee (Lab. Code, § 3706), and (8) declaratory relief.

Fuhrman filed a cross-complaint against Thompson, and subsequently amended that cross-complaint to allege causes of action for breach of contract, breach of joint venture, breach of fiduciary duty, accounting of joint venture, and dissolution of joint venture.

A sixteen-day bench trial commenced on August 11, 2016, followed by posttrial briefing in November and December 2016. The court issued a statement of decision on February 24, 2017, in which it ruled in favor of Fuhrman on Thompson's complaint, and in favor of Thompson on Fuhrman's cross-complaint. The court also determined that the parties were to bear their own costs.

On March 15, 2017, Fuhrman filed a pleading entitled, "Defendant Thomas Fuhrman's Response to the Court's Statement of Decision." In that pleading, Fuhrman requested that the court amend the statement of decision to award him costs under section 1032, subdivision (b).

For reasons not explained by the parties, the court did not address Fuhrman's pleading until a hearing on September 14, 2017. At that hearing, the court rejected Fuhrman's request to amend the statement of decision to award him costs as an untimely motion for reconsideration under section 1008. The court then entered judgment on September 22, 2017, referencing the statement of decision. Notice of entry of judgment was provided on October 16, 2017.

On October 27, 2017, Fuhrman filed a memorandum of costs, claiming a total of $16,737.68 in costs. There is no indication in the record that the superior court took any action on Fuhrman's memorandum of costs.

On December 11, 2017, Fuhrman filed a motion for attorney fees and extraordinary costs. In that motion, Fuhrman claimed to be entitled to attorney fees and costs under Labor Code section 218.5 because Thompson made her claims for unpaid

wages in bad faith. There is no indication in the record that the court ruled on Fuhrman's motion for attorney fees.

On the same day Fuhrman filed his motion for attorney fees, he filed a notice of appeal.

DISCUSSION

Code of Civil Procedure section 1032 is the fundamental authority for awarding costs in civil litigation. (*Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1108.) It establishes the general rule that "[e]xcept as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." (§ 1032, subd. (b).)

As our colleagues in Division Three of the Court of Appeal, Fourth Appellate District explained, the 1986 reenactment of section 1032 "substantially changed the statutory framework for determining which parties are entitled to recover costs as a matter of right." (*Charton v. Harkey* (2016) 247 Cal.App.4th 730, 741 (*Charton*).) In *Charton*, the court reviewed the differences in former section 1032 and the current version of the statute: "[T]he current version of section 1032 provides for recovery of costs as a matter of right if the party fits one of the four prevailing party definitions listed in section 1032, subdivision (a)(4). The current statute no longer focuses on the nature of the lawsuit to distinguish between parties who are entitled to costs as a matter of right and those who may recover costs in the court's discretion. Instead, section 1032 now focuses on the nature of the prevailing party's victory—the party with a net recovery, a defendant in whose favor a dismissal is entered, a defendant when neither party obtains any relief,

and a defendant against those plaintiffs who did not recover any relief against that defendant. If a party satisfies one of these four definitions of a prevailing party, the trial court lacks discretion to deny prevailing party status to that party. [Citation.]" (*Charton*, at p. 741.)

In contrast, where one of the four categories does not determine who is the prevailing party, the second sentence of section 1032, subdivision (a)(4) grants the trial court the discretion to determine the prevailing party and then allow costs or not, or to apportion costs. This prong of the statute operates as an express statutory exception to the general rule that a prevailing party is entitled to costs as a matter of right. (*Charton*, *supra*, 247 Cal.App.4th at p. 738.)

Here, Fuhrman contends he falls under one of the defined prevailing parties entitled to costs under section 1032, subdivision (a)(4). He points out that he is "a defendant where neither plaintiff nor defendant obtains any relief[.]" (See § 1032, subd. (a)(4).) We agree.

In *McLarand, Vasquez & Partners, Inc. v. Downey Savings & Loan Assn.* (1991) 231 Cal.App.3d 1450 (*McLarand*), the appellate court addressed the same issue before this court here. In that case, following a jury trial, the plaintiff was denied all relief on its complaint and the defendant was denied all relief on its cross-complaint. The appellate court affirmed the trial court's decision to award costs to the defendant as the prevailing party under section 1032, subdivision (a)(4). (*McLarand*, at p. 1452.) The appellate court explained: "A defendant cannot obtain relief unless it files a cross-complaint against the plaintiff because affirmative relief cannot be claimed in the answer.

(§ 431.30, subd. (c).) The statute, therefore, already contemplates that when neither the plaintiff nor the defendant who has filed a cross-complaint prevails, the defendant is the prevailing party entitled to costs." (*McLarand*, at p. 1454; see *Cussler v. Crusader Entertainment, LLC* (2012) 212 Cal.App.4th 356, 371 (*Cussler*) [following *McLarand* in affirming an award of costs to a defendant that prevailed on the complaint but did not recover anything on its cross-complaint].)

Because Fuhrman is like the defendants in *McLarand*, *supra*, 231 Cal.App.3d 1450 and *Cussler*, *supra*, 212 Cal.App.4h 356, he was the "prevailing party" after the bench trial and is entitled to recover costs "as a matter of right" unless otherwise provided by statute. (See § 1032, subd. (b).) Indeed, in the absence of another statute addressing costs, the trial court lacked discretion to deny Fuhrman his costs. (*Charton*, *supra*, 247 Cal.App.4th at p. 738.)

Thompson does not point to any statute that would prevent Fuhrman from recovering his costs as the prevailing party under section 1032, subdivision (b). However, Thompson brought claims against Fuhrman under Labor Code sections 226 and 1194, both of which discuss the award of attorney fees and costs to an employee who prevails in a suit against an employer. (See Lab. Code, §§ 226, subds. (e)(1), (h); 1194, subd. (a).) Fuhrman argues neither of these statutes prevent his recovery of costs in this matter. We agree.

In *Plancich v. United Parcel Service, Inc.* (2011) 198 Cal.App.4th 308 (*Plancich*), Division Two of the Court of Appeal, Fourth Appellate District addressed whether Labor

Code section 1194[2] prohibited a prevailing party, who is an employer, to recover its costs. In determining that the statute did not, the court observed that Labor Code section 1194 "does not contain express language excluding prevailing employers from recovering their costs; any suggestion that a prevailing employer is prohibited from recovering its costs is, at most, implied by the language of [Labor Code] section 1194." (*Plancich*, at p. 313.) Thus, the court concluded, "based on the plain meaning of the words of the statutes in question, [Labor Code] section 1194 does not provide an 'express' exception to the general rule permitting an employer, as a prevailing party, to recover costs under . . . section 1032, subdivision (b), because Labor Code section 1194 makes no mention of prevailing employers." (*Plancich*, at p. 313.)

Here, we agree with Fuhrman that Labor Code section 1194 would not prohibit his recovery of costs as the prevailing party under section 1032, subdivision (b). Further, it does not matter that the court found that Fuhrman was not Thompson's employer. Fuhrman was a nonemployee prevailing party under Labor Code section 1194. And we see no language in Labor Code section 1194 that would prevent a nonemployee prevailing party to seek its costs under section 1032.

Similarly, we see no language in Labor Code section 226 that would prohibit Fuhrman from recovering costs under section 1032, subdivision (b). Like Labor Code

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2 Labor Code section 1194, subdivision (a) provides: "Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit."

section 1194, subdivision (a), Labor Code section 226, subdivisions (e)(1) and (h) do not contain express language excluding prevailing employers from recovering their costs. Instead, they are silent on the issue. Section 226, subdivision (e)(1), provides, in relevant part: "An employee suffering injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a) . . . is entitled to an award of costs and reasonable attorney's fees." Section 226, subdivision (h), provides that: "An employee may also bring an action for injunctive relief to ensure compliance with this section, and is entitled to an award of costs and reasonable attorney's fees." Because Labor Code section 226 is similar to Labor Code section 1194 regarding fees and costs, we find our Division Two colleagues' interpretation of Labor Code section 1194 in *Plancich*, *supra*, 198 Cal.App.4th 308 at page 313 helpful here. Thus, we conclude that Labor Code section 226 does not prohibit a nonemployee prevailing party from recovering its costs under section 1032, subdivision (b).

In addition to claiming he is entitled to costs under section 1032, Fuhrman maintains he is entitled to costs under Labor Code section 218.5. We disagree.

Labor Code section 218.5 provides:

> "(a) In any action brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions, the court shall award reasonable attorney's fees and costs to the prevailing party if any party to the action requests attorney's fees and costs upon the initiation of the action. However, if the prevailing party in the court action is not an employee, attorney's fees and costs shall be awarded pursuant to this section only if the court finds that the employee brought the court action in bad faith. This section shall not apply to an action brought by the Labor Commissioner. This section shall not apply to a surety issuing a bond pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the

> Business and Professions Code or to an action to enforce a mechanics lien brought under Chapter 4 (commencing with Section 8400) of Title 2 of Part 6 of Division 4 of the Civil Code.
>
> "(b) This section does not apply to any cause of action for which attorney's fees are recoverable under Section 1194."

"[Labor Code] [s]ection 218.5 is a two-way fee shifting statute, permitting an award of attorney fees to either employees or employers who, as relevant here, prevail on an ' "action brought for the nonpayment of wages," ' or 'on account of nonpayment of wages.' [Citations.] If the employee's action was instead brought to remedy an employer's legal violation (i.e., failure to provide a mandatory meal/rest break; [Labor Code] § 226.7), there is no basis for awarding fees under [Labor Code] section 218.5 . . . . [Citation.] In such a case, employee claims are to be governed by the default American rule that each side must cover its own attorney fees. [Citation.]" (*Ramos v. Garcia* (2016) 248 Cal.App.4th 778, 785 (*Ramos*).)

"Where a prevailing party in a court action is 'not an employee,' [Labor Code] section 218.5, subdivision (a) further provides that an award of attorney fees and costs may be made 'only if the court finds that the employee brought the court action in bad faith.' [Citation.]" (*Ramos, supra,* 248 Cal.App.4th at p. 785.)

Here, Fuhrman claims that he is a nonemployee prevailing party on the claims Thompson brought that fall under Labor Code section 218.5. Further, he asserts that Thompson brought those claims in bad faith; thus, he is entitled to his costs under the statute. We disagree. Before Fuhrman can be awarded his costs under Labor Code section 218.5, the statute requires that the court find that Thompson brought her action in

bad faith. (See Lab. Code, 218.5, subd. (a); *Ramos, supra,* 248 Cal.App.4th at p. 785.) There is no such finding in the record.

On the same day Fuhrman filed his notice of appeal of the judgment, he also filed a motion seeking his attorney fees and costs under Labor Code section 218.5. There is no indication in the record that the superior court ruled on this motion. Apparently, to address this shortcoming, Fuhrman claims in his opening brief that Thompson brought her claim for unpaid wages in bad faith. However, this court, on direct appeal, does not make findings of fact to award costs under Labor Code section 218.5. (Cf. *Leader v. Cords* (2010) 182 Cal.App.4th 1588, 1599-1600 [whether trustee acted in bad faith within the meaning of statute authorizing an award of attorney fees against a trustee who opposed a contest to the trustee's account without reasonable cause and in bad faith is a factual question for the probate court's determination in the first instance]; *Kendis v. Cohn* (1928) 90 Cal.App. 41, 68-69 [bad faith is a question of fact to be determined by the jury or by the trial court, and the reviewing court will not make such a finding in the absence of evidence]. Instead, Fuhrman had to move for such costs under the statute in the superior court in the first instance. He did not do so in a timely fashion, and the superior court did not make any finding of bad faith. According, Fuhrman is not entitled to his costs under Labor Code section 218.5, even though he is entitled to some costs under section 1032. Because Labor Code section 218.5 expressly provides for fees and costs for certain causes of action, it supersedes a party's right to recover costs under section 1032, subdivision (b) as to those specific causes of action. (See § 1032, subd. (b).)

Here, Fuhrman argues that Thompson's first cause of action is actually a claim for unpaid regular wages in the amount of $10 per hour, not a claim for failure to pay minimum wage (which would fall under Labor Code section 1194).[3] To this end, Fuhrman notes that Thompson alleges that Fuhrman promised to pay her $10 per hour, which exceeded the minimum wage at that time. Indeed, in the operative complaint, Thompson acknowledged that the $10 hourly wage surpassed the minimum wage of $8 per hour (that existed until June 30, 2014) as well as the $9 per hour minimum wage, which became effective on July 1, 2014. Further, Thompson's allegations of the amount of damages owed for her first cause of action hinged on the $10 per hour pay. Therefore, we agree with Fuhrman that Thompson's first cause of action was for unpaid wages and falls under Labor Code section 218.5. As such, because the superior court did not find that Thompson brought that claim in bad faith, Fuhrman cannot recover costs associated with that cause of action.

In conclusion, Fuhrman is entitled to his costs under section 1032, subdivision (b) as a matter of right. (See *Charton*, *supra*, 247 Cal.App.4th at p. 738.) Moreover, the superior court lacked the discretion to deny Fuhrman his reasonable costs under section 1032, subdivision (b). (See *Charton*, at p. 738.) However, Fuhrman is not entitled to the costs associated with Thompson's first cause of action for unpaid wages because costs for that cause of action are governed by Labor Code section 218.5.

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3 In the caption of the operative complaint, the first cause of action is listed as "Failure To Pay Minimum Wages Earned." In the body of the complaint, the first cause of action is called "Unlawful Violation of Wage and Hour Requirements - Unpaid Minimum Wages and Unpaid Wages Promised."

Although we conclude that the court did not have discretion to deny Fuhrman his costs as a prevailing party under section 1032, it is well within the superior court's discretion to determine what was reasonably necessary and reasonable in amount under the statute. (See *Seever v. Copley Press, Inc.* (2006) 141 Cal.App.4th 1550, 1556-1557.)

DISPOSITION

The judgment is reversed. The matter is remanded to the superior court with instructions to award costs to Fuhrman under section 1032, subdivision (b). The superior court is not to award any costs under Labor Code section 218.5. The superior court may conduct whatever further proceedings it deems necessary to determine the reasonable costs to be awarded to Fuhrman. In the interests of justice, the parties are to bear their own costs on appeal.

HUFFMAN, Acting P. J.

WE CONCUR:

IRION, J.

GUERRERO, J.